BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRILL EDWARDS	)	
Claimant	)	
	)	
VS.	)	
	)	
FOSS MOTOR COMPANY, INC.	)	
Respondent	)	Docket No. 244,923
	)	
AND	)	
	)	
UNIVERSAL UNDERWRITERS GROUP	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board (Board) review of Administrative Law Judge (ALJ) Pamela J. Fuller's November 27, 2001, Decision. The Board heard oral argument on June 4, 2002.

APPEARANCES

Claimant appeared by his attorney, Scott J. Mann of Hutchinson, Kansas. The respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award. In addition, at oral argument before the Board, the parties stipulated to a June 21, 2000, accident date and a pre-injury average weekly wage of $1,144.70 as found by the ALJ in the Decision.

ISSUES

The ALJ awarded claimant a 7 percent permanent partial general disability based on claimant's permanent functional impairment. The ALJ denied claimant's requests for a work disability, payment of past medical expenses as authorized, future medical treatment, and additional weeks of temporary total disability and temporary partial disability compensation. The ALJ denied those workers compensation benefits because she found claimant had undergone surgery on his own with an unauthorized physician. The ALJ further found the unauthorized surgery had worsened claimant's work-related low back injury resulting in permanent restrictions limiting claimant's ability to work and his need for additional ongoing medical treatment.

Claimant appeals and contends he proved his low back surgery was reasonable and necessary medical treatment to cure and relieve the effects of his work-related low back injury. Accordingly, claimant argues he is entitled to a permanent partial general disability based on a work disability, payment of past medical expenses as authorized, ongoing future medical treatment, additional weeks of temporary total disability and temporary partial disability compensation.

Respondent, however, requests the Board to affirm the Decision. Respondent argues claimant's worsening low back condition was the result of the unauthorized surgery not reasonably necessary to cure and relieve the effects of the work-related injury. Accordingly, respondent contends that the unauthorized surgery, not claimant's work-related low back injury, caused claimant's current severe work restrictions, the need for temporary total and temporary partial disability compensation, and the need for future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and hearing the parties arguments, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. On August 31, 1992, claimant started working for respondent as an automobile mechanic.

2. Claimant suffered his first low back injury while working for respondent on October 24, 1994. Respondent provided medical treatment for the injury, and claimant was taken off work for six months.

3. Claimant returned to work for respondent as a mechanic with work restrictions of no lifting over 50 pounds and no extended standing, squatting, or crawling.

4. After claimant returned to work in 1995 following the October 24, 1994 accident, he continued to have pain and discomfort in his low back and left leg. On October 16, 1995, claimant had an acute exacerbation of his low back pain at home. The pain was so severe that claimant was unable to come to a standing position.

5. At that time, claimant first sought medical treatment through his family physician, Dr. David R. Edwards. Dr. Edwards then referred claimant to physical medicine and rehabilitation physician, Dr. J. Raymundo Villanueva.

6. Dr. Villanueva treated claimant from October 26, 1995, through April 15, 1996. Claimant received conservative medical treatment consisting of medications, a TENS Unit, and home exercises. Dr. Villanueva released claimant from his care on April 15, 1996, with medium work restrictions of 50 pounds maximum lift and frequent lifting or carrying limited to 25 pounds. Anti-inflammatory and pain medications were prescribed, and claimant was instructed to continue a home exercise program.

7. After the October 16, 1995, exacerbation, claimant returned to work in a service advisor position instead of his mechanic's position. The service advisor position did not require claimant to perform any mechanical work. But it did require him to be on his feet, to get in and out of automobiles, and to bend and stoop while inspecting incoming vehicles.

8. In October 1996, respondent promoted claimant to the service manager position. Both the service manager position and the service advisor position required claimant to work 9.5 hours per day, five days per week. The service manager's position required claimant to be on his feet most of the working hours of the day walking through the shop and overseeing the work of both the mechanics and the service advisors.

9. Although both the service manager's position and the service advisor's position were neither as heavy nor required the bending of the mechanic position, claimant testified his low back condition worsened as he continued to work. He described the symptoms worsening as he had to stand, walk, sit, and bend at the waist at work. In order to get through the workday, claimant had to take pain medication to tolerate the severe pain.

10. After Dr. Villanueva released claimant, he was returned to his family physician, Dr. Edwards, for further medical treatment, including the pain medication needed for his continuing low back pain and discomfort. But the respondent's workers compensation insurance carrier refused to provide claimant with those medications or any other medical treatment.

11. On August 6, 1996, an attorney who claimant had employed wrote respondent's insurance carrier a letter requesting the carrier to pay for certain prescriptions claimant needed for his constant low back pain and discomfort. The respondent's insurance carrier did not respond to the attorney's letter, and claimant had to continue to pay for his medications on his own.

12. Because claimant continued to have progressively increased pain and discomfort, claimant's family physician, Dr. Edwards, referred claimant to board certified orthopedic surgeon Lawrence A. Vierra, D.O., located in Liberal, Kansas. Dr. Vierra first saw claimant on December 2, 1998.

Dr. Vierra found claimant with low back complaints of pain. Claimant gave a history of activity causing severe back pain that radiated into both lower extremities. Claimant's low back pain originated from the 1994 work-related accident and was exacerbated in 1995. The severe pain was altering claimant's lifestyle, and he was interested in some relief. At that time, claimant was taking muscle relaxers and pain medications for relief.

After completing a physical examination of claimant, Dr. Vierra diagnosed claimant with (1) chronic low back pain with discogenic and radicular factors, (2) radiculitis of the lower extremities, and (3) a history of disc protrusion at L5-S1. Dr. Vierra scheduled claimant to undergo an MRI examination and continued claimant on medications.

13. Claimant had an MRI examination of his lumbar spine on October 9, 1998. The radiologist's conclusion was moderate degenerative disc disease with small central herniated nucleus pulposus at L5-S1. Dr. Vierra also reviewed the MRI films and found "definite extrinsic pressure and displacement and deformity of the left S1 nerve root which correlates well with Mr. Edward's symptoms."[1] At that visit, Dr. Vierra reviewed with claimant treatment options, including the benefits and risks of surgery. Dr. Vierra continued claimant on medication, back exercises, and suggested swimming pool therapy. Dr. Vierra's treatment and diagnostic testing were paid for by claimant's private health insurance and the balance owed was paid out of claimant's pocket.

14. In May 1999, claimant employed his present attorney to represent him in his workers compensation claim. In a letter dated May 26, 1999, a demand was made on respondent's insurance carrier for payment of past medical expenses and the appointment of Dr. Vierra or Dr. Villanueva as claimant's treating physician. Respondent's insurance carrier did not respond to the demand letter. So, on June 11, 1999, claimant filed an Application for Hearing and an Application for Preliminary Hearing with the Division of Workers Compensation.

15. On August 19, 1999, a preliminary hearing was held before the ALJ. Claimant's preliminary hearing requests were for payment of past medical expenses as authorized expenses and the appointment of an authorized treating physician. In the August 20, 1999, preliminary hearing Order, the ALJ ordered respondent to provide medical treatment for claimant's low back injury and to pay medical expenses as authorized medical for the expenses incurred since June 11, 1999. At the preliminary hearing, claimant offered and the ALJ admitted an August 12, 1999, letter from Dr. Vierra outlining claimant's diagnosis

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[1] Vierra Depo. (June 22, 2001), Ex. 1, October 29, 1998 medical record.

and his recommendation for claimant to undergo surgery, specifically, a percutaneous decompression at L5-S1 and annuloplasty.

16. The respondent authorized two physicians to examine claimant and make treatment recommendations if appropriate. One of the physicians was Dr. J. E. Harrington. Dr. Harrington did not testify in this matter and his medical records are not part of the evidentiary record.

17. The other authorized physician was Dr. Gary M. Kramer, a board-eligible orthopedic surgeon. The respondent authorized Dr. Kramer to examine claimant and, if needed, make recommendations for treatment. Dr. Kramer testified in this case and his medical records are part of the evidentiary record.

18. Dr. Kramer saw claimant on two occasions, December 14, 1999, and December 28, 1999. Claimant provided Dr. Kramer with a history of an increasing difficulty with low back pain and constant left leg pain. Dr. Kramer reviewed the October 9, 1998, MRI examination requested by Dr. Vierra. The MRI examination showed a herniation at L5-S1. Dr. Kramer also conducted a physical examination of claimant. His diagnosis was herniated lumbar disc. Dr. Kramer prescribed medication for claimant's pain and discomfort and scheduled claimant for another MRI examination on December 28, 1999. That MRI examination did not show a L5-S1 herniation. The only abnormality was dessicated L5-S1 disc.

Because the MRI did not redemonstrate a herniated disc at L5-S1, Dr. Kramer opined that claimant did not require surgery. He referred claimant for continued medical management with a physical medicine and rehabilitation physician. Respondent, however, denied the referral. Dr. Kramer then had claimant undergo a physical capacity evaluation (FCE). Based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.) (AMA Guides [4th ed.]), Dr. Kramer assigned claimant a 5% permanent functional impairment.

The FCE was determined a valid presentation of claimant's physical capabilities. The FCE recommended that claimant return to work with restrictions limiting sitting, standing, walking, bending, stooping, falling, and lifting. But Dr. Kramer released claimant to return to work without restrictions because claimant showed no evidence of structural injury. Based on his experience, Dr. Kramer opined he was not aware of any medical information that suggested permanent protection was needed for soft tissue back pain.

19. Because claimant did not receive any medical treatment from respondent's authorized physicians, Dr. Harrington and Dr. Kramer, claimant again requested a preliminary hearing for authorized medical treatment. Claimant's symptoms were progressively worsening as he continued to work the 9.5 hours per day as the service manager which required him to have prolonged periods of standing, sitting, and bending.

20. At the March 28, 2000, preliminary hearing, claimant requested a change in the authorized treating physician or the appointment of a neutral physician to conduct an independent medical examination and determine his need for further medical treatment. Based again on Dr. Vierra's surgery recommendation, claimant argued he was in need of low back surgery. The respondent argued that claimant did not need surgery because both Dr. Harrington and Dr. Kramer had determined claimant was at maximum medical improvement. The preliminary hearing transcript contains only the statements of the parties' attorneys. Claimant did not provide testimony and no new medical evidence was admitted. The parties agreed that the ALJ should appoint orthopedic surgeon Dale E. Darnell, M.D., to perform an independent medical examination.

Claimant's attorney stated on the record, "the parties will be free to reschedule this matter if there's a disagreement as to what Doctor Darnell concludes as far as additional treatment."[2]

21. Dr. Darnell saw claimant on June 21, 2000. Dr. Darnell found claimant with complaints of low back pain and pain radiating down his left leg. Claimant told Dr. Darnell he was working under restrictions of lifting limited to 30 pounds and no repetitive lifting, bending, or stooping. Dr. Darnell had claimant's previous medical treatment records available for review before the examination.

Based on his physical examination of claimant, the review of claimant's medical records, and a review of the December 28, 1999, MRI, Dr. Darnell diagnosed claimant with degenerative disc disease of the lumbar spine at L5-S1. Utilizing the AMA Guides (4th ed.), Dr. Darnell opined that claimant had a permanent functional impairment of 7 percent. He further opined that the restrictions claimant was currently working under were appropriate.

Dr. Darnell also opined that claimant did not need surgery. He went on to opine that the percutaneous disc excision surgery recommended by Dr. Vierra was not appropriate for degenerative disc disease. Because there is no consistent evidence of extradural nerve root compression, the disc excision would not benefit claimant.

22. After Dr. Darnell's recommendation of no surgery, claimant decided to go ahead with the back surgery recommended by Dr. Vierra without the authorization of either the ALJ or the respondent. He testified that the pain had progressed to the point he could not work a day without severe pain.

23. Before Dr. Vierra operated on claimant, he had claimant undergo an extensive battery of diagnostic testing. Those tests included an EMG and nerve conduction study, a discography, and a CT scan. The tests indicated L5-S1 abnormalities consisting of a central disc protrusion or herniation, disc degeneration, and an extreme annular tear.

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[2] P.H. (3-28-2000) at 4.

Those abnormal findings were consistent with claimant's symptoms. Dr. Vierra also conferenced and consulted with other physicians before he operated on claimant. The result of the conference was the conclusion that the surgical procedure was reasonable and only the surgery may offer relief given the total clinical picture.[3]

24. Claimant underwent low back surgery performed by Dr. Vierra on September 20, 2000. Dr. Vierra's surgical procedure was an L5-S1 decompression, instrumentation and fusion. Dr. Vierra took claimant off work for six weeks and then returned claimant to work with temporary restrictions. Claimant was temporarily restricted to working four hours per day, no lifting, bending, stooping, crawling, kneeling, and no standing or sitting more than 60 minutes at a time. Claimant was also instructed to wear a back brace.

25. Dr. Vierra last testified in this matter on August 1, 2001. At that time, claimant remained under his care and treatment. After surgery, Dr. Vierra opined the claimant had fairly good relief from his low back pain. His left leg pain was also better, but his right leg pain was worse. Dr. Vierra last saw claimant on June 13, 2001. At that time, he did not think claimant was at maximum medical improvement. Dr. Vierra pointed out that residual neurological problems associated with claimant's lower extremities took from 12 to 18 months following surgery to stabilize. At that time, less than 12 months had elapsed since the surgery. In fact, Dr. Vierra testified there was a moderate to high probability that claimant would require additional surgical therapy in the future.

Nevertheless, based on the AMA Guides (4th ed.), Dr. Vierra opined that claimant had an 18% permanent functional impairment as a result of his low back injury. Dr. Vierra imposed permanent restrictions on claimant's activities as follows: (1) work day limited to four to six hours per day; (2) no repetitive lifting, bending, kneeling, stooping, or reaching; (3) no overhead work; (4) no lifting over 10 pounds; (5) avoid prolonged standing or walking over 30 minutes; (6) sitting, standing, walking as tolerated with ability to change positions; and (6) wear back brace as needed.

26. Dr. Darnell's deposition was taken October 24, 2001. Dr. Darnell was informed at that time claimant had undergone surgery after he had examined claimant on June 21, 2000. Dr. Darnell was also informed that Dr. Vierra had claimant undergo additional diagnostic studies before surgery which included a discography, CT scan, EMG and nerve conduction studies. Dr. Vierra performed an L5-S1 decompression, instrumentation and fusion.

Dr. Darnell was asked whether Dr. Vierra's procedure was reasonably necessary to cure the effects of claimant's injury. Dr. Darnell concluded the chances of the instrumentation fusion performed by Dr. Vierra helping claimant was far greater than the

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[3] Vierra Depo. (June 22, 2001), Cl. Ex. 2.

previously proposed percutaneous disc excision.[4] Dr. Darnell went on to opine that his differences with Dr. Vierra was not whether any surgery would be beneficial, but whether the percutaneous disc excision would benefit claimant. According to Dr. Darnell, if Dr. Vierra felt claimant would benefit from surgery, he proceeded in the right manner.[5] From the one time he examined claimant and the information he had at that time, Dr. Darnell still would not have operated on claimant. But Dr. Darnell also opined that Dr. Vierra saw claimant over a long period of time and the decision to operate, whether right or wrong, good or bad, was a decision that Dr. Darnell would leave up to Dr. Vierra.[6]

27. The record is somewhat conflicting and unclear on the date claimant returned to work after surgery and the number of hours claimant worked until he terminated his employment with respondent with the last date worked of April 12, 2001. Based on a review of the testimony of claimant, Dr. Vierra, and Larry McConnell, respondent's general manager, claimant worked 9.5 hours per day until his September 20, 2000, surgery. After surgery, Dr. Vierra had claimant off work for six weeks or until approximately October 31, 2000. Claimant then returned to part-time work for respondent from two to four hours per day until his last date worked on April 12, 2001.

28. At the time claimant returned to work in November 2000, he was returned to a part-time service manager position. Mr. McConnell testified claimant was able to perform the service manager's job working four hours per day. But respondent could not operate the automobile service department effectively with claimant only working four hours per day. Accordingly, on April 12, 2001, Mr. McConnell offered claimant a service advisor position working four hours per day until he was released for a full-time job. When released, respondent intended to return claimant to the service manager position. The service advisor's position that claimant was to return to was an accommodated job within Dr. Vierra's temporary restrictions. The position allowed claimant to sit, answer the telephone, schedule customer appointments, and handle customer complaints over the telephone. Claimant was to be paid the same hourly wage he was earning while he was working as the part-time service manager.

29. Claimant testified and Mr. McConnell verified that claimant returned the next day and resigned his position with respondent indicating he did not think he could perform the service advisor's position because he had to meet customers and walk around and bend at the waist in order to inspect the automobiles the customers brought in for service. But Mr. McConnell again told the claimant that the offered service advisor's position was an accommodated position. Claimant would not have to perform the more strenuous physical

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[4] Darnell Depo. at 24.

[5] Darnell Depo. at 25.

[6] Darnell Depo. at 34.

demands of the service advisor's position. Claimant would only be required to answer the telephone, schedule appointments, and answer customer complaints over the telephone.

30. At the time claimant last testified at the July 18, 2001, regular hearing, claimant was unemployed and had not looked for employment.

31. Admitted into evidence at Larry McConnell's deposition were respondent's payroll records showing the amount of wages claimant earned for the months of September 2000 through April 2001. Those gross monthly wage totals were as follows:

1.	September 2000	$5,879.17
2.	October 2000	$1,587.50
3.	November 2000	$4, 782.50
4.	December 2000	$3,175.00
5.	January 2001	$720.95
6.	February 2001	$1,491.07
7.	March 2001	$2,836.47
8.	April 2001	$582.66

CONCLUSIONS OF LAW

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends.[7]

2. Work disability is defined as the average between wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[8]

3. However, claimant is limited to benefits based on functional impairment so long as claimant earns a wage equal to 90% or more of his pre-injury average weekly wage.[9]

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[7] K.S.A. 1999 Supp. 44-501(a).

[8] K.S.A. 1999 Supp. 44-510e(a).

[9] K.S.A. 1999 Supp. 44-510e(a).

4. If claimant refuses to accept or even attempt accommodated work offered by respondent, the wage of the accommodated job may be imputed to claimant in a work disability calculation.[10]

5. Even if an accommodated position is not offered by respondent, claimant still must show that he made a good faith effort to find employment. If claimant did not make a good faith effort to find employment, a wage will be imputed to claimant based on the evidence in the record as to claimant's wage-earning ability.[11]

6. The employer has a duty to provide medical treatment for an injured worker as may be reasonably necessary to cure and relieve the effects of the injury.[12]

7. But if the employer has knowledge of the work-related injury and refuses or neglects to reasonably provide medical treatment for the injury, the employee may provide the medical treatment, and the employer shall be liable for the related medical expenses.[13]

8. The ALJ limited claimant to a 7 percent permanent partial general disability award based on claimant's permanent functional impairment. The ALJ concluded that claimant was not entitled to a work disability because he chose to have unauthorized surgery. The ALJ found that the unauthorized surgery likely was responsible for the increase in claimant's symptoms and permanent restrictions resulting in a decrease in claimant's ability to work.

9. The record is clear that respondent provided medical treatment for claimant's original October 24, 1994, work-related low back injury and for an exacerbation of that injury which occurred on October 16, 1995. Respondent provided that treatment until Dr. Villanueva released claimant on April 15, 1996. Thereafter, as the result of an August 20, 1999, preliminary hearing Order, respondent authorized two physicians to examine and determine what, if any, treatment was necessary for claimant's continuing low back complaints. Both of those physicians determined that claimant had met maximum medical improvement and released claimant to return to work without restrictions.

10. At another preliminary hearing held on March 18, 2000, the claimant agreed that a neutral physician would be appointed to determine whether claimant was in need of additional medical treatment. In the preliminary hearing transcript, claimant's attorney

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[10] *Foulk v. Colonial Terrace,* 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

[12] K.S.A. 44-510h(a) (1993 Furse).

[13] K.S.A. 44-510j(h) (1993 Furse).

specifically stated that if there was a disagreement on the neutral physician's opinion concerning claimant's medical treatment, then another preliminary hearing would be requested.

11. But claimant did not request another preliminary hearing after Dr. Darnell, the court-appointed independent medical examiner, opined he would not recommend surgery as a further treatment modality for claimant's low back injury. Nevertheless, claimant went ahead with the surgical procedure as recommended by Dr. Vierra who was not authorized by either respondent or the ALJ.

12. The Board concludes, as did the ALJ, that the surgery and post-surgery treatment provided by Dr. Vierra was unauthorized medical treatment under the Workers Compensation Act.[14] The Board finds respondent and its insurance carrier did not refuse or neglect to provide claimant with medical treatment. The two physicians that respondent authorized to examine and treatment claimant and the neutral physician that examined claimant simply did not agree with Dr. Vierra's opinion that claimant was a surgical candidate.

13. However, based on Dr. Darnell and Dr. Vierra's opinions, the Board finds it was reasonable for Dr. Vierra to perform the surgery on claimant's low back in an effort to cure the progressive and chronic pain that claimant was suffering from as the result of his work-related low back injury. In fact, Dr. Darnell's opinion that claimant did not need surgery was the result of only a one-time examination. Where, in contrast, Dr. Vierra's opinion to perform the surgery was based on observing and treating claimant over a long period of time, extensive diagnostic testing, and consulting with other physicians regarding the reasonableness of and the necessity for the spinal surgery. Dr. Darnell concluded that the difference between his and Dr. Vierra's opinion was not whether any surgery would be beneficial, but whether a percutaneous disc excision would be beneficial. In his words, "And I think Dr. Vierra proceeded in the right manner. If he felt that surgery was indicated, I think he did the right thing."[15]

14. Claimant has established that his low back and lower extremity pain worsened as he continued to work for respondent. He testified the pain was severe and he suffered every day. Claimant's decision to have the back surgery recommended by Dr. Vierra was not unreasonable based on claimant's progressive pain and Dr. Vierra's expert opinion. Unfortunately, as is experienced with some back surgeries, claimant did not have a good result. Before the surgery, even with the severe pain, claimant was able to work as a service manager 9.5 hours per day. Now, claimant is restricted to working only four to six hours per day by Dr. Vierra.

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[14] K.S.A. 44-501 *et seq.*

[15] Darnell Depo. at 25.

15. The Board finds Dr. Vierra's recommended low back surgery was reasonable and necessary. Claimant's decision to have the surgery was otherwise reasonable. The surgery was performed in an attempt to cure the effects of claimant's work-related injury. Thus, whether the surgery was authorized or unauthorized is not controlling and does not disqualify claimant's entitlement, if proven, to increased permanent partial general disability benefits based on a work disability.

16. The Board finds the greater weight of the persuasive evidence proves claimant was offered the service advisor's position working four hours per day at his pre-injury hourly wage as a service manager. Respondent was willing to accommodate claimant in this position temporarily until he was released to full-time employment and could return to the service manager's position. The accommodated service advisor position was within claimant's restrictions as imposed by Dr. Vierra. But claimant resigned his employment without attempting the accommodated position. Accordingly, the Board finds claimant should have attempted to perform the offered accommodated employment. Thus, the Board finds the weekly wage of the four hour service advisor position of $482[16] should be imputed to claimant. Comparing claimant's pre-injury average weekly wage of $1,144.70 to the imputed $482 weekly wage results in a wage loss of 58 percent.

17. The parties stipulated to a June 21, 2000 accident date. Claimant suffered his first low back injury on October 24, 1994, and an exacerbation of that injury on October 16, 1995. Thereafter, the claimant continued to work for respondent and claimant's testimony proves that his low back injury progressed and worsened. Additionally, before the 1995 exacerbation, claimant was working as an automobile mechanic. After claimant returned to work in 1995, he was placed in the service advisor position, and then in October 1996, claimant worked as a service manager until his stipulated June 21, 2000, accident date. The work task loss component of the work disability test is determined as " . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . ."[17]

The only physician to express a work task loss opinion after claimant's surgery was Dr. Vierra. Claimant's attorney provided Dr. Vierra with three work tasks claimant had performed as an automobile mechanic. Dr. Vierra opined claimant had lost the ability to perform two of the three tasks resulting in a work task loss of 66 2/3 percent. No physician expressed an opinion that included the work tasks of the service advisor and the service manager jobs. The Board, therefore, finds that claimant failed to meet his burden of proving a work task loss, because no physician expressed an opinion based on all the work

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[16] The $482 weekly wage was computed by dividing the claimant's pre-injury average weekly wage of $1144.70 by the 9.5 hours claimant worked for an hourly rate of $24.10. The $24.10 hourly rate was then taken times the 20 hours claimant would have worked as a part-time service advisor.

[17] K.S.A. 1999 Supp. 44-510e(a).

tasks claimant performed during the 15 years preceding the June 21, 2000, date of accident.

18. The Board concludes that claimant is entitled to a 29 percent permanent partial general disability based a work disability found by averaging claimant's wage loss of 58 percent with a zero percent task loss.

19. The claimant did not file a submission letter or a brief before the Board in this case. The respondent requested the Board to affirm the ALJ's finding that claimant had a permanent functional impairment of 7 percent. The Board notes that the claimant did not dispute that functional impairment finding at oral argument and therefore affirms the 7 percent functional impairment finding of the ALJ.

20. The Board finds that after the claimant's September 20, 2000, surgery, Dr. Vierra took claimant off work for six weeks, and claimant is, therefore, entitled to six weeks of temporary total disability during that period.

21. The claimant also requested temporary partial disability compensation for the weeks claimant returned to part-time work following his September 20, 2000, surgery. Dr. Vierra took claimant off work for six weeks following the surgery. As noted above, the Board finds claimant is entitled to temporary total disability compensation for those six weeks. Thereafter, claimant returned to part-time work for respondent working somewhere between two and four hours per day.

Compensation for temporary partial general disability is 66 2/3 percent of the difference between the employee's pre-injury average weekly wage and the amount the employee is actually earning after the injury, not to exceed the maximum weekly compensation rate.[18]

As noted in the above findings, monthly wage statements covering the months from September 2000 to April 2001 were admitted into the record at Larry McConnell's deposition. Those statements show that claimant had monthly gross earnings ranging from $5, 879.17 in September 2000 to as low as $720.95 in January 2001 and $582.66 in April 2001. At oral argument, claimant simply made an unsubstantiated request for temporary partial disability compensation during that period. Claimant did not provide any weekly wage amounts or identify the weeks he was claiming temporary partial disability compensation.

The Board finds the monthly wage statements admitted into the record failed to prove claimant's part-time weekly earnings that would allow an accurate computation of

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[18] K.S.A. 1999 Supp. 44-510e(a).

temporary partial disability compensation owed claimant during that period of time. Thus, the Board finds the claimant failed to meet his burden of proof on this issue.

22. All medical expenses incurred by Dr. Vierra in the treatment of claimant's low back injury are unauthorized and are denied.

23. Claimant is entitled to the unauthorized statutory medical allowance in the maximum amount of $500.00.

24. Claimant may apply for payment of future medical treatment upon proper application and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Pamela J. Fuller's November 27, 2001, Decision should be and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terrill Edwards, and against the respondent, Foss Motor Company, Inc., and its insurance carrier, Universal Underwriters Group, for an accidental injury sustained on June 21, 2000, and based upon an average weekly wage of $1,144. 70.

Claimant is entitled to 33 weeks[19] of temporary total disability compensation at the rate of $383 per week or $12,639.00, followed by 9.14 weeks of permanent partial general disability at the rate of $383 per week or $3,500.62 for a 7 percent permanent partial general disability based on functional impairment for the period after the 33 weeks of temporary total disability compensation and April 12, 2001, claimant's last date worked, followed by 105.99 weeks of permanent partial disability compensation at the rate of $383 per week or $40,594.17, for a 29% permanent partial general disability, making a total award of $56,733.79.

As of March 30, 2003, claimant is entitled to 33 weeks of temporary total disability compensation at the rate of $383 per week or $12,639.00, followed by 111.57 weeks of permanent partial general disability at the rate of $383 per week or $42,731.31, for a total due and owing claimant of $55,370.31, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of $1363.48 of permanent partial general disability compensation shall be paid at $383 per week until claimant is fully paid or until further order of the Director.

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[19] The ALJ awarded claimant 27 weeks of temporary total disability compensation which the parties did not dispute on appeal. The additional six weeks of temporary total disability compensation are the six weeks awarded by the Board following claimant's surgery.

Dr. Vierra's medical treatment, including the September 20, 2000, surgery, was unauthorized and the respondent has no liability for those related expenses.

Claimant is entitled to unauthorized medical allowance of $500.00, upon presentation of an itemized statement verifying the same.

Future medical treatment may be awarded upon proper application to and approval by the Director.

All other orders contained in the Decision are adopted by the Board.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation